

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF FOR APPELLANT
AND JOINT APPENDIX**

IN THE **416**
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9198

COLUMBIA CONSTRUCTION CO., INC., a Corporation,
et al., *Appellants*,

v.

DAVID SACKETT AND EVERETT J. ROSENBERG,
ETC., *Appellees*.

Appeal from the District Court of the United States for the
District of Columbia.

*United States Court of Appeals
for the District of Columbia*

FILED MAR 18 1946

Joseph W. Wyatt
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IN THE
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DAVID SACKETT AND EVERETT J. ROSENBERG,
ETC., *Appellees*.

Appeal from the District Court of the United States for the
District of Columbia.

BRIEF FOR APPELLANT.

THE CASE.

This is an appeal from an order of the District Court of the United States for the District of Columbia granting a motion for summary judgment. (App. 26.) There was no written opinion in the District Court.

The Appellant was the defendant-third-party plaintiff below and the Appellees were the third-party defendants.

JURISDICTIONAL STATEMENT.

This action was brought in the District Court of the United States for the District of Columbia to recover damages alleged to have been sustained by the plaintiff because of a defective condition of premises belonging to the defendant, Columbia Construction Company. The District Court had jurisdiction of this action by virtue of Section 301 of Title 11 of the District of Columbia Code.

The defendant, Columbia Construction Company, brought in David Sackett and Everett J. Rosenberg, third-party defendants, under Rule 14 of the Rules of Civil Procedure.

In response to a motion made by the third-party defendants for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, an order was entered on November 30, 1945, in the District Court dismissing the third party complaint (App. 26). Notice of appeal from this order was filed by the defendant on December 28, 1945. This Court has jurisdiction upon appeal to review said order by virtue of Section 101 of Title 17 of the District of Columbia Code.

STATEMENT OF CASE.

On June 30, 1944, Kermit Steuer filed his complaint (App. 2) in the District Court of the United States for the District of Columbia, in which he alleged that he had sustained damages in the amount of \$11,016.22 when he fell on steps on premises belonging to defendant, Columbia Construction Company, and the defendants, Abraham Orleans and David Brown. Defendants Orleans and Brown answered the complaint denying that they were at any time owners of the premises in question. The defendant, Columbia Construction Company, answered the complaint admitting it was the owner of the premises but denying in general the allegations of negligence (App. 4). The defendant, Columbia Construction Company, also alleged as a defense that it had leased the premises prior to the time of the alleged

injury, that the tenants under the lease were in possession and control of the premises at the time of the alleged injury, that the tenants were obligated by the terms of the lease to keep the premises in good repair, and that it was not the duty of the defendant, in consequence of the lease, to maintain said premises in repair (App. 5, 6).

On October 21, 1944, the defendant, Columbia Construction Company, moved for leave to make the tenants parties to the action and for service of a third-party complaint on them. This motion was granted on October 31, 1944. Subsequently, a summons and third-party complaint (App. 7, 8) were served on the tenants, David Sackett and Everett J. Rosenberg, and they became third-party defendants in this action.

The essential allegations of the third-party complaint were that on January 28, 1943, a written lease had been entered into in which the defendant, Columbia Construction Company, was the landlord and the third-party defendants, David Sackett and Everett J. Rosenberg, were the tenants. This lease covered the premises on which the alleged injury to the plaintiff, Kermit Steuer, took place. In this lease there is the provision

“AND the said Lessee covenants and agrees * * * that it will at its own expense during said term keep said leased premises, including the building, fixtures, plumbing and appurtenances thereof in substantial condition and in good repair, clean, and in good working order and proper sanitary condition and repair, remove snow and ice from the sidewalks thereof, and the Lessor or its assigns shall not be liable therefor or for any work or materials furnished said premises, and the said Lessee has no authority to incur any debt or make any charge against the Lessor or its assigns or create any lien upon said leased property for any work or materials furnished the same.”

It was further alleged that the third-party defendants entered into said premises under said lease and were in possession thereof at the time of the alleged injury. It was

further alleged that any failure to maintain the property in a safe condition was a breach of obligation of the tenant to the landlord. The complaint asked judgment on behalf of the defendant, Columbia Construction Company, against the third-party defendants for all sums "that may be adjudged against defendant, Columbia Construction Company, in favor of the plaintiff, Kermit Steuer."

On November 25, 1944, the third-party defendants filed their answer to the third-party complaint (App. 9). In it the allegations pertaining to the lease and possession under it are admitted. Breach of obligation under the lease is denied.

On September 24, 1945, the plaintiff, Kermit Steuer, filed an amended complaint (App. 10, 11) by which the third-party defendants were joined as defendants.

On September 26, 1945, the third-party defendants moved for summary judgment against the plaintiff and the third-party plaintiff on the grounds that there was no genuine issue as to any material fact (App. 12). Attached to the motion papers was the affidavit of David Sackett, one of the third-party defendants (App. 13, 14, 15). This affidavit had attached to it as Exhibit "A" a copy of the lease, Exhibits "B," "C," "D," and "E," which were photographs of the premises and adjoining property, and Exhibit "F," which was a copy of a covenant of record relating to the premises.

The facts relating to the premises and the lease covering them, as established by the pleadings and the motion papers, are as follows: The injury to the plaintiff, Kermit Steuer, is alleged to have happened on the steps in front of the building at No. 3730 Tenth Street, Northeast. This building and the lot on which it stands are a part of a so-called "Park and Shop" development consisting of ten separate pieces of property which, as a group, constitute the "Park and Shop" development. The front portion of the ten lots constitute the area in which parking is permitted.

No. 3730 is at the end of the group of ten and is substantially larger than the others in the group. The building at No. 3730 is set back from the street line a distance of some fifteen feet whereas the other buildings in the group are a distance fifty-five or sixty feet from the street line. The fifty-five or sixty feet in the case of the smaller buildings and part of the fifteen feet in the case of No. 3730 constitute the parking area. The remainder of the fifteen feet in front of No. 3730 is a yard.

The floor levels of the stores, including the store at No. 3730, are about two feet higher than the ground level. Along the front of the buildings and in front of No. 3730 there is a concrete platform level with the floors of the buildings and about four feet in width. This platform is reached by two steps which run the length of the platform except at the southerly side of No. 3730 where there is only one step as the ground level comes up high enough to make the second step unnecessary.

Above the concrete platform and extending along its entire length is a roof which projects out from the building at a height of approximately twelve feet.

The concrete platform is continuous and a patron of the stores may walk from store to store or from one end to the other without leaving the platform.

The injury to the plaintiff, Kermit Steuer, is alleged to have been caused by a defect in the steps leading to the platform located at the northerly end of the premises at No. 3730. This defect is located definitely within the bounds of the lot comprising the premises at No. 3730.

When the "Park and Shop" area was created, a covenant (App. 25) was placed of record which provides that the easterly unimproved portion of the lots should be used for terrace and parking purposes only, with the right of unobstructed parking and ingress and egress, that it should at all times be kept in good order and repair and that the cost and expense thereof should be paid by the owners proportionately.

The Columbia Construction Company owned three other units in the "Park and Shop" development, and the remaining units were owned by persons unconnected with this case.

Under date of January 28, 1943, the Columbia Construction Company, as owner of the premises at No. 3730, entered into a lease of said premises with David Sackett and Everett J. Rosenberg for a period of twenty-eight months (App. 15, 16, 17, 18). The tenants entered into possession of the premises under the lease and were in possession thereunder at the time of the injury to the plaintiff, Kermit Steuer, which is alleged to have taken place on April 3, 1944.

The lease is set forth in the Appendix in its entirety (App. 15, 16, 17, 18). It contains a covenant (App. 16) on the part of the lessee to

"keep said leased premises including the building, fixtures, plumbing and appurtenances thereof in substantial condition and in good repair, clean and in good working order * * *."

The provisions of the lease will be discussed in detail in the argument pertaining to it.

STATUTES, TREATIES, REGULATIONS OR RULES INVOLVED.

There are no specific statutes, treaties, regulations or rules involved in this case.

STATEMENT OF POINTS.

The District Court erred in granting the motion for summary judgment and in dismissing the third-party complaint of Columbia Construction Company against David Sackett and Everett J. Rosenberg, third-party defendants.

SUMMARY OF ARGUMENT.

POINT I

The third-party defendants as parties to the lease dated January 28, 1943, expressly covenanted to keep the premises in repair, and the covenant by its letter and by its intentment covers the part of the premises alleged by the plaintiff, Kermit Steuer, to have been defective.

POINT II

Being bound by the covenant to repair the premises, the tenants must indemnify the landlord against liability for damages occasioned by failure to keep the premises in repair.

POINT III

The defendant, Columbia Construction Company, properly brought in its tenants as third-party defendants under Rule 14 of the Rules of Civil Procedure.

POINT IV

The covenant of record relating to the property does not prevent the inclusion of the property in a lease or prevent the tenants in such lease from assuming the obligation to repair the premises.

POINT V

The affidavit of David Sackett contains conclusions which are erroneous and not supportable and contains statements which are not admissible under Rule 56(e) of the Rules of Civil Procedure.

POINT VI

The motion for summary judgment made by the third-party defendants should have been denied.

ARGUMENT.**Point I.**

The Third-Party Defendants as Parties to the Lease Dated January 28, 1943, Expressly Covenanted to Keep the Premises in repair, and the Covenant by Its Letter and by its Intendment Covers the Part of the Premises Alleged by the Plaintiff, Kermit Steuer, to Have Been Defective.

The lease under which the third-party defendants occupy the premises as tenants contains the following provision (App. 16):

“AND the said Lessee covenants and agrees * * * that it will not suffer or commit any waste to, in or upon the said building, fixtures and premises; that it will at its own expense during said term keep said leased premises, including the building, fixtures, plumbing and appurtenances thereof in substantial condition and in good repair, clean, and in good working order and proper sanitary condition, all of which premises are now in such condition and repair, remove snow and ice from the sidewalks thereof, and the Lessor or its assigns shall not be liable therefor or for any work or materials furnished said premises, and the said Lessee has no authority to incur any debt or make any charge against the Lessor or its assigns or create any lien upon said leased property for any work or materials furnished the same.”

The defective spot in the steps which is alleged by the plaintiff, Kermit Steuer, to have been the cause of the injury to him is in the step in front of the building of the premises at No. 3730 and is definitely within the bounds of the lot which constitute those premises.

However they may be considered, whether as a part of the building, or a part of the premises not included in the building, or as an appurtenance of the premises, the defective steps come within the express terms of the covenant to repair.

First, it seems clear that the steps are a part of the building. The platform and steps are constructually integrated with the building. The building is so designed and constructed that steps are necessary to gain entrance to it. The steps are a reasonable method of meeting this necessity, and are appropriate to the building. The concrete platform constitutes a front porch of the building and the steps lead to it. This porch is covered by a roof extending from the building. If the platform and roof were removed, the building would be functionally and architecturally incomplete. Therefore, there seems to be no question but that the steps must be considered a part of the building. Being a part of the building, the tenants are obligated by their covenant to keep them repaired.

Secondly, if the steps are considered not a part of the building, they are none the less expressly covered by the covenant. The covenant makes a distinction between that part of the premises which is the building and that part of the premises which is not the building. In the covenant is found the clause, "upon the said building, fixtures and premises." It is apparent from this use of language that "premises" has a broader meaning than "building." If the covenant were limited to the building, the conjunctive use of "premises" would not be necessary. If the word, "premises," includes something other than building, it can only be the portion of the lot not occupied by the building. The covenant also contains the clause, "Said leased premises including the building, fixtures, plumbing and appurtenances thereof." Again "premises" is used in a sense broader than the sense of "building." Therefore, if the steps in question are not part of the building, they are a part of the premises expressly mentioned in the covenant and subject to the obligation of the tenants to make repairs.

And, thirdly, if the steps, since they are subject to the rights of other property owners to have right of way over them for themselves and their patrons, are to be considered

as only an appurtenance of the premises, the covenant to repair still makes it the obligation of the tenants to repair the steps. The covenant to repair specifically applies to the "premises, including the building, fixtures, plumbing, and appurtenances thereof."

The conclusion is inescapable, therefore, that it was the obligation of the tenants to make any repairs called for, and the failure, if any, so to do, was a breach of the tenant's obligation to the landlord.

Point II.

Being Bound by the Covenant to Repair the Premises, the Tenants Must Indemnify the Landlord Against Liability for Damages Occasioned by Failure to Keep the Premises in Repair.

The lessor of premises who is held liable for injuries occasioned by failure to keep them in repair may recover indemnity from the lessee whose primary duty it was to make the repairs. 16 R. C. L., Landlord and Tenant, § 613; *Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 31 N. E. 987; Note: 40 L. R. A. (N. S.) 1147 at 1148.

Point III.

The Defendant, Columbia Construction Company, Properly Brought in its Tenants as Third-Party Defendants Under Rule 14 of the Rules of Civil Procedure.

Rule 14(a) of the Rules of Civil Procedure provides in part

"Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him."

As the tenants under the lease are obligated to make repairs and hence must indemnify the lessor if failure to make repairs results in the lessor's being held liable for damages, the tenants were properly made third-party defendants under Rule 14(a).

Point IV.

The Covenant of Record Relating to the Property Does Not Prevent the inclusion of the Property in a Lease or Prevent the Tenants in such Lease from Assuming the Obligation to Repair the Premises.

The covenant of record which was made at the time the "Park and Shop" development was created (App. 25) provides for restrictions on the use of the easterly unimproved portions of the lot which make up the development. These restrictions on the use are that such easterly unimproved portions may be used only for terrace and parking purposes with the right of unobstructed parking and ingress and egress over and across such easterly portions of said lots.

It further provides that the terrace and parking space shall at all times be kept in good order and repair and that the cost and expense thereof should be borne by the property owners proportionately.

It is difficult to ascertain from the affidavit of Sackett (App. 13, 14) what significance is attached by the appellees to this covenant, but it is to be presumed that the position of the appellees is that the covenant relieves them from obligation to repair as provided in the lease.

There is no reason that a piece of property subject to a restrictive covenant may not be leased, or included in a lease. The lessee, of course, gets no higher title than his lessor and takes the property subject to the restrictions. Restrictive covenants do not affect the title and do not affect the right of the title owner to lease. If this were not so, no home owner in a residential area subject to restrictive covenants could lease his property, and this, of course, is patently not so.

The covenant does not relieve the property owner the obligation to keep the property in good order and repair; on the contrary, the covenant expressly provides that the property subject to the covenant shall be kept in good order and repair. There is, therefore, nothing to prevent the owner of the property from contracting with his tenant that the tenant will keep the property in good order and repair. A contract so made is binding on the tenant.

The provision for apportioning cost and expense of repairs among the property owners in no way affects the contract between the property owner and his tenant. If the property owner has a right to contribution from his neighboring property owners for expenses for repairs, such right can in no way affect the tenant's obligation to the owner to make the repairs.

Furthermore, these tenants are third-party defendants, and judgment is prayed against them only to the extent that the owner of the property may be liable. If the owner of the property by some construction of the covenant can shift his liability to make repairs to neighboring property owners, he may do so but that is certainly not grounds for dismissing the third-party complaint.

Point V.

The Affidavit of David Sackett Contains Conclusions Which Are Erroneous and Not Supportable and Contains Statements Which Are Not Admissible Under Rule 56(e) of the Rules of Civil Procedure.

The affidavit of David Sackett contains some conclusions and statements which require comment. It is stated (App. 14)

“that the portion of the walk where the accident here complained of occurred would not ordinarily be used by a patron of the premises occupied by the defendants and third-party defendants.”

In view of the fact the premises occupied by the third-party defendants are at the end of the "Park and Shop" development and somewhat removed because of location from the remaining stores in the development, and in view of the fact that said portion of the walk is in front of said premises, the conclusion cannot be sustained. Any patron of the premises occupied by the third-party defendants would have to use the platform and steps leading to it, and the exact spot would depend on the angle from which he approached.

The affidavit further contains this statement (App. 14):

"that at no time, either before or after the execution of the lease under which defendants and third-party defendants held possession, was the existence of this covenant disclosed to them nor was any mention made of any obligation on their part to inspect or repair or maintain any part of the terraces, walks or parking area."

There is no obligation on the part of the tenants to inspect, repair or maintain any property not within the premises leased by them. They expressly contracted to repair that property. The obligation of their landlord to repair or not to repair by virtue of a covenant has no bearing on their obligation whatsoever.

It is further stated in the affidavit (App. 14):

"that after the execution of said lease, David Brown, an officer and agent of said Columbia Construction Co., Inc., represented to this affiant that the said company planned to improve the terrace or lawn in front of the leased premises at its expense, thereby indicating that it was the duty of said company to care for and maintain said area and not the duty of the lessees."

Improvement made to the leasehold by the owner of the property has no bearing on the duty of the tenant to make repairs if he has covenanted to do so.

It is further said (App. 15):

“that subsequent to April 3, 1944, but during the period of said lease, the leased premises were sold to Bernard S. Rosenberg, Samuel Spitzer, Jewel Spitzer Rosenberg and Jule D’Avanzo Spitzer who thereafter made repairs to the sidewalk surrounding the leased premises without notice to or demand upon the defendants and third-party defendants.”

Testimony as to the conduct of these individuals in no way binding on the Columbia Construction Company would not be admissible upon the trial of the action. Hence, this statement is not properly includable in the affidavit under Rule 56(e) of the Rules of Civil Procedure.

Point VI.

The Motion for Summary Judgment Made by the Third-Party Defendants Should Have Been Denied.

Respectfully submitted,

JOSEPH W. WYATT,
Attorney for Appellant,
1614 Eye Street, N. W.,
Washington 6, D. C.

APPENDIX

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IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9198.

COLUMBIA CONSTRUCTION CO., INC., a Corporation,
et al., *Appellants*,

v.

DAVID SACKETT AND EVERETT J. ROSENBERG,
ETC., *Appellees*.

**Appeal from the District Court of the United States for the
District of Columbia.**

JOINT APPENDIX.

Filed June 30 1944

• • • • •
In the District Court of the United States
For the District of Columbia.

Civil Action 24877.

KERMIT STEUER, 5414 First Place N. W.
Washington, D. C., *Plaintiff*

v.

COLUMBIA CONSTRUCTION Co., Inc., a corporation,
7426 13th Street N. W.

and

ABRAHAM ORLEANS
2839 Chesterfield Place N. W.
Washington, D. C.

and

DAVID BROWN
7426 13th Street N. W.
Washington, D. C., *Defendants.*

Complaint.

*Damages suffered by reason of negligent maintenance of
property.*

The plaintiff, Kermit Steuer, sues the defendants, owners of Lot 31 in Square 3822 as recorded in the Land Records of the District of Columbia with improvements thereon known as 3730 Tenth Street Northeast in the District of Columbia, or who were the owners of the said property on the 3rd day of April, 1944, for that on to wit, the said 3rd day of April, 1944, the plaintiff while, lawfully and at the implied or expressed invitation of the defendants, walking

in front of the said premises and down the steps in front of the same, stepped into a wide and deep crevice on the said steps consisting of a rough, deep, and wide break in the concrete on the steps, and fell down the said steps breaking both his elbows and suffering numerous other physical injuries. That the defendants had negligently and without regard or concern for the safety of the plaintiff or other persons properly on these premises maintained the said premises in such a dangerous condition and at the same time failed to keep proper lighting over these premises to make the plaintiff aware of this dangerous condition. That the defendants knew or should have known of the existence of this dangerous condition on their property. That as a result of the failure of the defendants to maintain their property in a safe condition the plaintiff suffered the above

described personal injuries and as a consequence,
 2 in addition thereto, the plaintiff incurred medical and hospital expenses, losses to his business, and other numerous losses and expenses exclusive of the pain and suffering, mental anguish, embarrassment and inconvenience which the plaintiff suffered all to his damage in the sum of Eleven Thousand and Sixteen and 22/100 (\$11,016.22) Dollars.

Wherefore the plaintiff prays for judgment against the defendants both jointly and severally in the full sum of Eleven Thousand and Sixteen and 22/100 (\$11,016.22) Dollars.

KERMIT STEUER,
Plaintiff.

MILTON M. BURKE,
Attorney for Plaintiff

Woodward Building
 Washington 5, D. C.
 NA. 2490

Plaintiff demands trial by jury.

• • • • •

3 Filed Jul 17 1944

• • • • •
Answer of Defendant, Columbia Construction Co., Inc.,

First Defense.

The defendant, Columbia Construction Co., Inc., a corporation, answering the complaint herein alleges as follows:

1. Admits that it was the owner of Lot 31 in Square 3822, known as 3730 Tenth Street, N. E., in the District of Columbia, on the 3rd day of April, 1944.

2. Denies that it is the present owner of said Lot 31 in Square 3822, known as 3730 Tenth Street, N. E., in the District of Columbia, having disposed of said property on or about the 26th day of June, 1944.

3. Denies that the plaintiff was on said premises
4 at any time at the expressed invitation of the defendant.

4. Alleges that it is without knowledge of information sufficient to form a belief as to the truth of the averment that the plaintiff, while lawfully and at the implied invitation of the defendant walking in front of the said premises and down the steps in front of the same, stepped into a wide and deep crevice on the said steps, consisting of a rough, deep and wide break in the concrete on the steps and fell down the said steps, breaking both his elbows and suffering numerous other physical injuries.

5. Denies that the defendant had negligently and without regard or concern for the safety of the plaintiff or other persons properly on these premises, maintained the said premises in such a dangerous condition and at the same time, failed to keep proper lighting over these premises to make the plaintiff aware of this dangerous condition.

6. Denies that the defendant knew or should have known of the existence of this dangerous condition on its property.

7. Denies that as a result of the failure of the defendant to maintain its property in a safe condition, the plaintiff suffered personal injuries.

8. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averment that the plaintiff incurred medical and hospital expenses, losses to his business and other numerous losses and expenses, exclusive of the pain and suffering, mental anguish, embarrassment and inconvenience which the plaintiff suffered all to his damage in the sum of Eleven Thousand and Sixteen and 22/100 Dollars. (\$11,016.22).

Second Defense.

5 9. On or about the 28th day of January, 1943, the defendant, Columbia Construction Co., Inc., entered into a lease with David Sackett and Everett J. Rosenberg, t/a All State Home Equipment Company, whereby the defendant, Columbia Construction Co., Inc., leased to said David Sackett and Everett J. Rosenberg said premises designated as 3730 Tenth Street, N. E., for a term of twenty-eight (28) months, commencing with the first day of December, 1942 and ending on the last day of March, 1945.

10. By the terms of said lease, the defendant, Columbia Construction Co., Inc., did not retain control of any portion of said premises and did not agree in any way whatsoever to maintain and repair said premises or any part thereof during the term of said lease.

11. By the terms of said lease, the lessees thereof, to wit, David Sackett and Everett J. Rosenberg, did agree that they would, at their own expense during said term, keep the premises, including the building, fixtures, plumbing and appurtenances thereof, in substantial condition and in good repair, clean and in good working order and in proper sanitary condition.

12. Said lessees, to wit, David Sackett and Everett J. Rosenberg, entered into possession of said premises under said lease on or about the first day of December, 1942, and have been in possession at all times since that date.

13. Said David Sackett and Everett J. Rosenberg have at all times since the first day of December, 1942, including the third day of April, 1944, been in full and exclusive possession and control of the said premises and the whole thereof.

14. The defendant, Columbia Construction Co., Inc., has not been in possession or control of said premises or any part thereof at any time in term of said lease, including the third day of April, 1944.

6 WHEREFORE, the defendant, Columbia Construction Co., Inc., demands judgment that the Complaint herein be dismissed, together with the costs and disbursements of this action.

JOSEPH W. WYATT,
Attorney for Defendant,
Columbia Construction Co.,
Inc.,
Southern Building
Washington 5, D. C.

• • • • • • • •

Filed Nov 1 1944

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 24877

KERMIT STEUER, 5414 First Place, N. W., Washington, D. C.,
Plaintiff,

v.

COLUMBIA CONSTRUCTION Co., Inc., a corporation, 7426 - 13th
Street, N. W., Washington, D. C., *Defendant and Third-
Party Plaintiff,*

and

ABRAHAM ORLEANS, 2839 Chesterfield Place, N. W., Wash-
ington, D. C. and DAVID BROWN, 7426 - 13th Street,
N. W., Washington, D. C., *Defendants,*

v.

DAVID SACKETT and EVERETT J. ROSENBERG t/a All State
Home Equipment Company, 3730 - 10th Street, N. E.,
Washington, D. C., *Third-Party Defendant.*

Third-Party Complaint.

1. The plaintiff, Kermit Steuer, has filed against the de-
fendants, Columbia Construction Co., Inc., Abraham Or-
leans and David Brown, a complaint, a copy of which is at-
tached hereto and marked "Exhibit C".

2. The defendant, Columbia Construction Company here-
tofore, to wit, on the 28th day of January, 1943, entered into
a certain lease, in writing, with David Sackett and Everett
J. Rosenberg t/a All State Home Equipment Company,
whereby said Columbia Construction Company
8 leased to said David Sackett and Everett J. Rosen-
berg, the premises in the District of Columbia known

and designated as No. 3730 - Tenth Street, N. E., for a period of twenty-eight months, commencing with the first day of December, 1942, and ending with the last day of March, 1945.

3. Said lease dated the 28th day of January, 1943, contains the following provisions:

"And the said Lessee covenants and agrees * * * that it will at its own expense during said term keep said leased premises, including the building, fixtures, plumbing and appurtenances thereof in substantial condition and in good repair, clean, and in good working order and proper sanitary condition, all of which premises are now in such condition and repair, remove snow and ice from the sidewalks thereof, and the Lessor or its assigns shall not be liable therefor or for any work or materials furnished said premises, and the said Lessee has no authority to incur any debt or make any charge against the Lessor or its assigns or create any lien upon said leased property for any work or materials furnished the same."

4. That said David Sackett and Everett J. Rosenberg entered into possession of said premises under said lease and have been in possession thereof continuously since the first day of December, 1942 and are in possession thereof at the present time.

5. The possession of said premises by said David Sackett and Everett J. Rosenberg has at all times during the term of the aforesaid lease been exclusive and said Columbia Construction Company has not at any time during the term of said lease been in possession of said premises or had any control over them.

6. Any failure of said David Sackett and Everett J. Rosenberg to maintain the property in safe condition was a breach of obligation of said David Sackett and Everett J. Rosenberg to the Columbia Construction Company under the aforesaid lease, dated the 28th day of January, 1943.

Wherefore Columbia Construction Company demands judgment against Third-Party Defendants, David Sackett and Everett J. Rosenberg for all sums

that may be adjudged against defendant, Columbia Construction Company in favor of the plaintiff, Kermit Steuer.

JOSEPH W. WYATT

*Attorney for Third-Party
Plaintiff*

Southern Building
Washington 5, D. C.

12

Filed Nov 25 1944

Answer of Defendants, David Sackett and Everett J. Rosenberg, Trading as All State Home Equipment Company, to Third-Party Complaint.

1. The allegations of said paragraph are admitted.
 2. The allegations of said paragraph are admitted.
 3. The allegations of said paragraph, insofar as the same purport to set forth certain of the provisions of said lease, are believed to be true, but for greater certainty these
- 13 defendants refer to said lease.

4. The allegations of said paragraph are admitted.
5. These defendants admit they have held possession of said land under and pursuant to the terms of their said lease. The remaining allegations of said paragraph are conclusions of law to which they are not required to make answer.

6. The allegations of said paragraph are denied.

BRANDENBURG & BRANDENBURG

By A. LECKIE COX

*Attorneys for David Sackett
and Evertee J. Rosenberg,
trading as All State Home
Equipment Company, Third
Party Defendants.
719 15th Street, N. W.*

14

Filed Sep 28 1945

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 24877

KERMIT STEUER, 5414 First Place N. W., Washington, D. C.,
Plaintiff

-VS-

COLUMBIA CONSTRUCTION Co., Inc. a corporation, and ABRAHAM ORLEANS and DAVID BROWN and DAVID SACKETT and EVERETT J. ROSENBERG t/a All State Home Equipment Company, 3710 10th Street N. E., Washington, D. C.,
Defendants

-VS-

DAVID SACKETT and EVERETT J. ROSENBERG t/a All State Home Equipment Company, *Third-Party Defendants*.**Amended Complaint Joining Additional Defendants.**

The plaintiff, Kermit Steuer, sues the defendants, Columbia Construction Co., Inc., a corporation, Abraham Orleans, and David Brown, as owners and managers, and the defendants David Sackett and Everett J. Rosenberg t/a All State Home Equipment Company, as lessees and tenants, of Lot 31 in Square 3822 as recorded in the Land Records of the District of Columbia with improvements thereon known as 3730 Tenth Street Northeast, in the District of Columbia, or who were the owners, etc., on the 3rd day of April, 1944, for that on to wit, the said 3rd day of April, 1944, the plaintiff while, lawfully and at the implied or expressed invitation of the defendants, walking in front of the said premises and down the steps in front of the same, stepped into a wide and deep crevice on the said steps consisting of a rough, deep, and wide break in the concrete on the steps, and fell down the said steps breaking both his elbows and suffering numerous other physical injuries. That the defendants had negligently and without regard or

15 concern for the safety of the plaintiff or other person properly on these premises maintained the said premises in such a dangerous condition and at the same time failed to keep proper lighting over these premises to make the plaintiff aware of this dangerous condition. That the defendants knew or should have known of the existence of this dangerous condition on their property. That as a result of the failure of the defendants to maintain their property in a safe condition the plaintiff suffered the above described personal injuries and as a consequence, in addition thereto, the plaintiff incurred medical and hospital expenses, losses to his business, and other numerous losses and expenses exclusive of the pain and suffering, and mental anguish, embarrassment and inconvenience which the plaintiff suffered all to his damage in the sum of Eleven Thousand and Sixteen and 22/100 (\$11,016.22) Dollars.

Wherefore the plaintiff prays for judgment against the defendants both jointly and severally in the full sum of Eleven Thousand and Sixteen and 22/100 (\$11,016.22) Dollars together with the costs of this suit.

KERMIT STEUER

Plaintiff

MILTON M. BURKE

Attorney for Plaintiff

Woodward Building

Washington, 5, D. C.

Na. 2490

• • • • •

16

Filed Nov 25 1944

Answer of David Sackett and Everett J. Rosenberg Trading As All State Home Equipment Company, to Original Complaint.

These defendants admit that on, to-wit, the 3d day of April, 1944, they were possessed of premises known as 3730 Tenth Street, Northeast, in the District of Columbia,

under a certain lease from Columbia Construction Company, Inc., a corporation, dated the 28th day of January, 1943. The remaining allegations of said complaint are denied.

BRANDENBURG & BRANDENBURG

By A. LECKIE COX

*Attorneys for David Sackett
and Everett J. Rosenberg,
trading as All State Home
Equipment Company
719 15th Street, N. W.*

17

Filed Sept 26 1945

* * * * *

**Answer of David Sackett and Everett J. Rosenberg,
Trading as All State Home Equipment Company to
Amended Complaint.**

For answer to the amended complaint filed herein, the the defendants David Sackett and Everett J. Rosenberg, by their attorneys, adopt the answer filed by them to the original complaint.

BRANDENBURG & BRANDENBURG

By A. LECKIE COX

*Attorneys for David Sackett
and Everett J. Rosenberg*

* * * * *

18

Filed Sept 26 1945

Motion for Summary Judgment.

Come now David Sackett and Everett J. Rosenberg, defendants and third-party defendants herein, and move the Honorable Court for summary judgment against the plaintiff and third-party plaintiff on the ground that the pleadings and affidavit in support hereof show there is no genuine issue as to any material fact and that these defendants

and third-party defendants are entitled to judgment as a matter of law.

BRANDENBURG & BRANDENBURG,

By A. LECKIE COX

*Attorneys for David Sackett
and Everett J. Rosenberg.*

19

Filed Sep 26 1945

* * * * *

Affidavit in Support of Motion for Summary Judgment.

District of Columbia, ss:

David Sackett, being first duly sworn, on oath deposes and says that he is one of the defendants and third-party defendants herein and one of the lessees named in that certain lease executed by and between the Columbia Construction Company, Inc., a corporation, as lessor, and David Sackett and Everett J. Rosenberg, trading as All State Home Equipment Company, as lessees, on, to wit, the 28th day of January, 1943, for premises in the District of Columbia, known and designated as No. 3730 10th Street, N. E.; a copy of said lease is hereto annexed marked Exhibit "A" and hereby made part hereof; that said premises are part of a development commonly known as a "park and shop" area comprising Lots 22 to 31 in Square 3822 and the improvements thereon; that said development consists of several buildings which are used for store and other commercial purposes and which are built around an
20 area available for parking of vehicles of patrons and occupants of the various business establishments; that the entrances to the buildings open on a sidewalk which separates the buildings from and partially surrounds the parking area; that said sidewalk is used by patrons and occupants in entering and leaving the various establishments and also in walking to and from the public street and to and from other establishments, and the defendants

and third-party defendants have never exercised or attempted to exercise any control over the said sidewalk or over the steps leading from the parking area to it; that the portion of the walk where the accident here complained of occurred would not ordinarily be used by a patron of the premises occupied by the defendants and third-party defendants; photographs of the area are annexed hereto marked Exhibits "B", "C", "D" and "E"; that some of said buildings were owned at the time of the accident by Columbia Construction Co., Inc., a corporation, and others by person unknown to affiant; that affiant is advised and believes that said buildings and the lots on which they are located are subject to a covenant recorded among the land records of the District of Columbia, which provides that the owners of said lots, their lessees and patrons of improvements thereon shall have the right of ingress and egress and unobstructed parking over all the unimproved easterly portions of said lots and that the cost of keeping said easterly unimproved portions of said lots in good order and repair, clean and serviceable shall be borne by the owners in the proportion which the frontage of their properties abutting the terrace and parking area bears to the easterly frontage of said Lots 22 to 31; that a true copy of said covenant is annexed hereto marked Exhibit "F" and hereby made part hereof; that at no time, either before or after the execution of the lease under which defendants and third-party defendants held possession, was the existence of this covenant disclosed to them nor was any mention made of any obligation on their part to inspect or repair or maintain any part of the terraces, walks or parking area; that after the execution of said lease, David Brown, an officer and agent of said Columbia Construction Co., Inc., represented to this affiant that the said company planned to improve the terrace or lawn in front of the leased premises at its expense, thereby indicating that it was the duty of said company to care for and maintain said area and not the duty of the lessees; that

subsequent to April 3, 1944, but during the period of said lease, the leased premises were sold to Bernard S. Rosenberg, Samuel Spitzer, Jewel Spitzer Rosenberg and Jule D'Avanzo Spitzer who thereafter made repairs to the sidewalk surrounding the leased premises without notice to or demand upon the defendants and third-party defendants.

DAVID SACKETT.

* * * * *

Exhibit "A"

22

Filed Sep 26 1945

Lease.

This Agreement made this 28th day of January, 1943, by and between Columbia Construction Company, a corporation, party of the first part, hereinafter designated as 'Lessor', and David Sackett and Everett J. Rosenberg, tr/as the 'Allstate Home Equipment Company', parties of the second part, hereinafter designated as 'Lessee'.

Witnesseth that the Lessor for and in consideration of the sum of Seven Thousand (\$7000.00) Dollars rent, and the covenants, conditions and agreements herein contained, and on the part of the Lessee to be paid, kept and performed, and for no other consideration except as herein expressed does hereby let and rent to the said Lessee, and the said Lessee has hereby taken as tenant of the Lessor the following described premises, situate, lying and being in the District of Columbia and known and designated as premises No. 3730 Tenth Street, Northeast, for the term of twenty-eight months, commencing with the first day of December, 1942 and ending on the last day of March, 1945, at the said rental of Seven Thousand (\$7000.00) Dollars, payable without demand at the place designated by the Lessor in the following installments. Twenty-eight Hundred (\$2,800.00) Dollars in cash upon the execution of this agreement, the receipt of which is hereby acknowledge by the Lessor, and

the balance of the aforesaid rent shall be paid in monthly installments of One Hundred Fifty (\$150.00) Dollars in advance on the first day of each month during said term, commencing on the first day of December, 1942. The receipt of the aforesaid installments of One Hundred Fifty (\$150.00) Dollars due on December 1st, 1942 and January 1st, 1943 is hereby acknowledged by the Lessor.

And the said Lessee covenants and agrees to pay said lessor the said rent as aforesaid for the full term hereof; that it will not assign this lease or any portion of the term, or sublet the premises or any part thereof, without the written consent of the Lessor; that the said Lessee will not use or suffer to be used said premises for any disorderly

23 or unlawful purpose, or for any other purpose than the business of Lessee; that it will not suffer or commit any waste to, in, or upon the said building, fixtures and premises; that it will at its own expense during said term keep said leased premises, including the building, fixtures, plumbing and appurtenances thereof in substantial condition and in good repair, clean and in good working order and proper sanitary condition, all of which premises are now in such condition and repair, remove snow and ice from the sidewalks thereof, and the Lessor or its assigns shall not be liable therefor or for any work or materials furnished said premises, and the said Lessee has no authority to incur any debt or make any charge against the Lessor or its assigns or create any lien upon said leased property for any work or materials furnished the same.

The Lessee is hereby granted an option to renew this lease for a period of three years in addition to the within agreed term, at a monthly rental of Two Hundred Seventy-five (\$275.00) Dollars, said renewal to be under all of the same terms and conditions as set forth in this lease, excepting for this renewal clause. The Lessee shall be required to give to the Lessor thirty days notice of intention

to exercise the foregoing option, said notice to be given at least thirty days before the expiration of the term of this lease.

The Lessee agrees to comply with all laws and regulations relating to said premises at its own expense.

In the event of bankruptcy, insolvency, receivership, general assignment for benefit of creditors, execution against Lessee or occupation of premises by someone other than tenant in violation of the terms of this lease, or desertion or vacation of premises, the Lessor shall have the right without notice, a thirty days' or any other notice, being hereby expressly waived, to reenter and take possession or advise of the termination of this lease.

There is hereby expressly granted unto the Lessee the right to sublet the basement of the demised premises to Bernard S. Rosenberg, tr/as "The House of Wines", said right to continue during the term of this lease and any renewal or extension thereof.

24 And the Lessee agrees that it will at the end of its tenancy surrender the said leased premises in such substantial condition and good repair, good working order, etc., as aforesaid, and clean, ordinary wear and tear and loss by fire and storm excepted; that it will also pay all charges for gas, electricity, and water used on said premises when the bills therefore become due and payable; that it will not make any alterations or changes in said premises, without written consent, or increase the rate of fire insurance upon the building and improvements upon said premises beyond an ordinary risk.

It is further agreed that payment of rent shall cease if the said premises shall be destroyed by fire, or be so damaged by fire or any unavoidable casualty as to make the same uninhabitable, and either party may forthwith terminate this lease by written notice to that effect.

Provided always, that if the rent aforesaid, or any installment thereof, shall not be paid within three days after

the same becomes due and payable as aforesaid, although no demand shall have been made for the same; or if the Lessee or its assigns shall fail or neglect to keep and perform each and every of the covenants, conditions and agreements herein contained and on the part of the said Lessee to be kept and performed, or if the same or any of them shall be broken, then and in each and every such case from thenceforth and at all times thereafter, at the option of the Lessor or its assigns, the Lessee's right of possession shall thereupon end and determine, and the Lessor or its assigns shall be entitled to the possession of said leased premises, and to reenter the same without demand of rent or demand of possession of the said premises, and may forthwith proceed to recover possession of the said leased premises by process of law, any notice to quit or of intention to exercise said option, or to reenter the same being hereby expressly waived by the Lessee and its assigns.

And in the event of such reentry by process of law, or otherwise, the Lessee nevertheless covenants and agrees to remain answerable for any and all damages, deficiency or loss of rent which the Lessor may sustain by such reentry and the Lessor reserves full power, which is hereby acceded to by the Lessee, to relet the said premises for the benefit of the Lessee.

25 And the Lessee expressly covenants and agrees to pay said rent as aforesaid, and also keep and perform each and every of the covenants, conditions, and agreements herein contained.

It is mutually agreed that this lease shall bind the executors, administrators, successors, and assigns of the respective parties hereto.

And it is further agreed, that no waiver of any breach of any covenant, condition, or agreement herein shall operate as a waiver of the covenant, condition or agreement itself, or any subsequent breach thereof.

In Testimony Whereof the said parties have hereunto

signed their names and affixed their seals the day and year first hereinbefore written.

COLUMBIA CONSTRUCTION
COMPANY, a corporation,

By /s/ ABE ORLEANS,
President

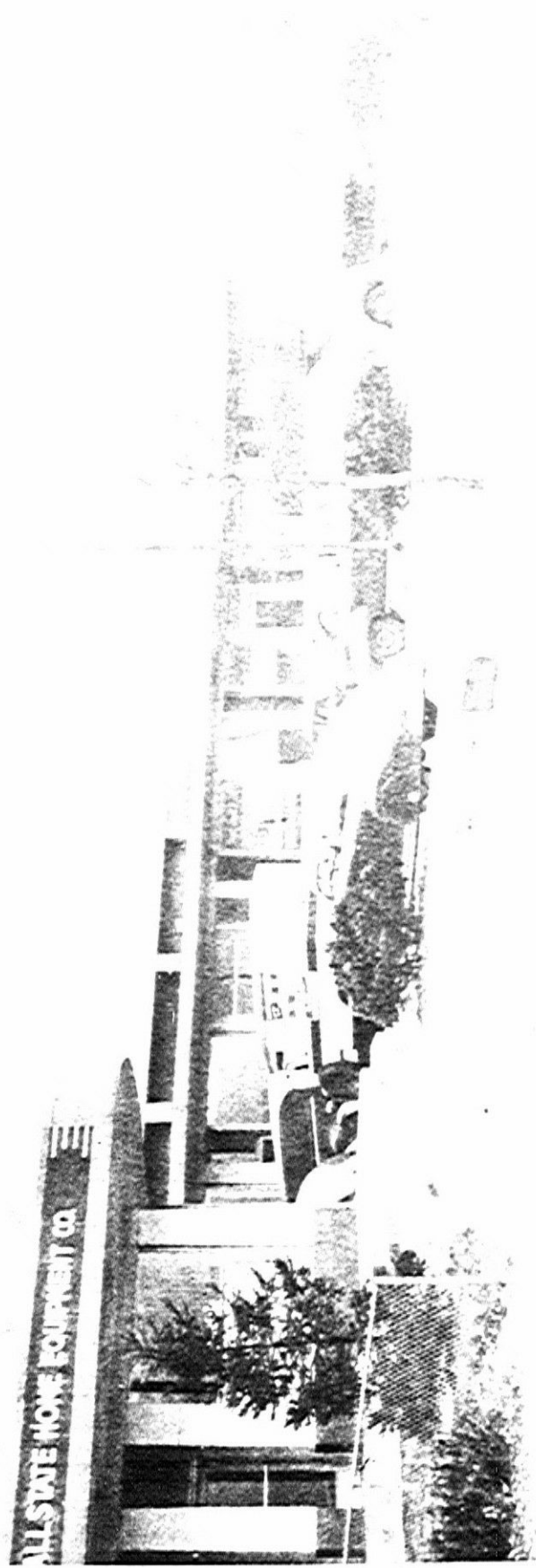
ATTEST:

DAVID BROWN,
Secretary.

ALLSTATE HOME EQUIP-
MENT COMPANY, a partner-
ship

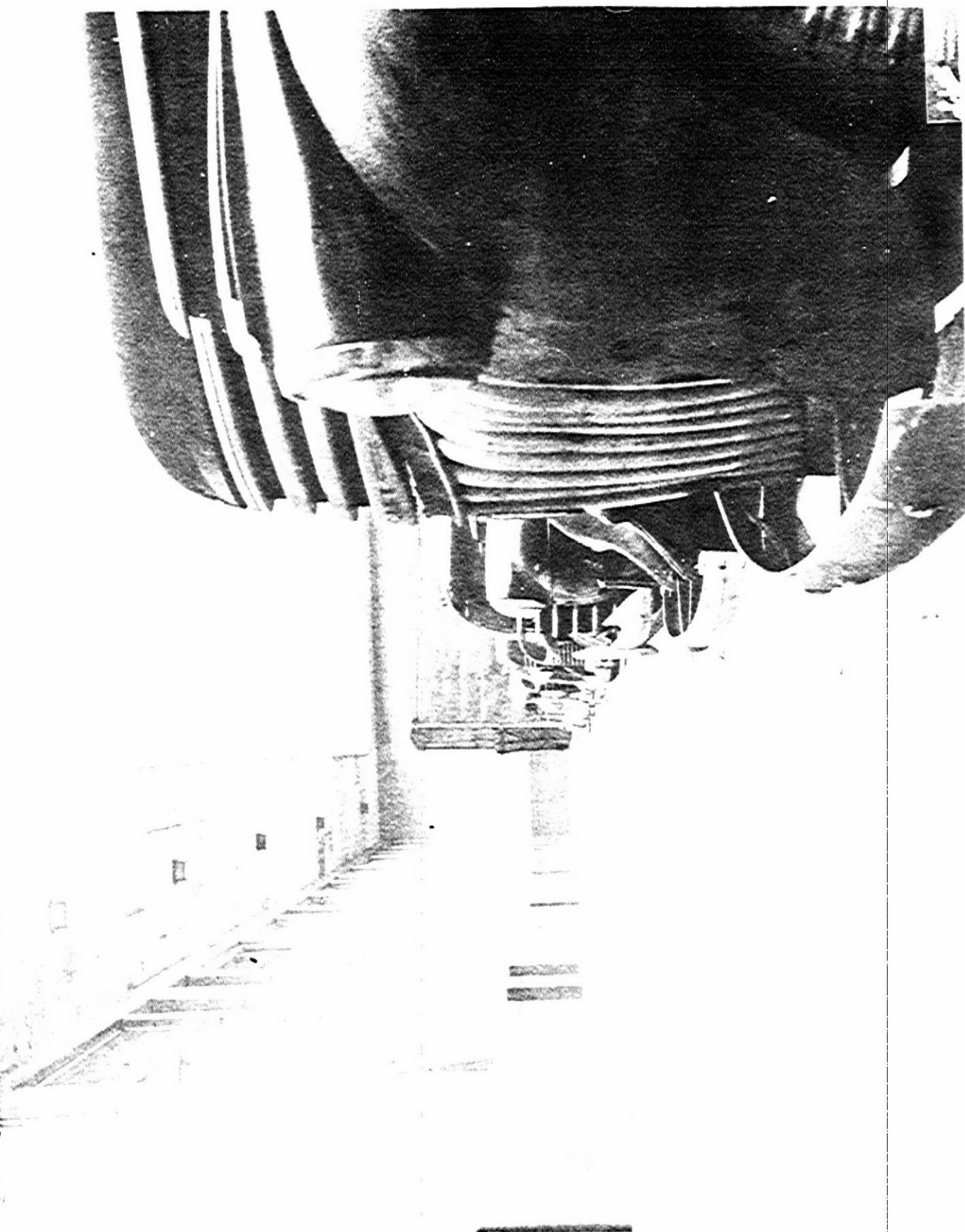
By /s/ DAVID SACKETT,

• • • • •









Filed Sep 26 1945

Exhibit "F"**Covenant.**

Subject to the covenant and agreement contained in Deed from Merton E. Myerson and wife to Esther Silver and Cecelia Silver, joint tenants dated November 24, 1939 and recorded in Liber 7416 folio 129 of the Land Records of the District of Columbia, as follows: - "That all of the Easterly unimproved portions of Lots 22 to 31 in Square 3822 on which the improvements of said lots abut, shall be used by the owner or owners of said lots, their respective heirs and assigns and the lessees and patrons of improvements erected on said lots in common for terrace and parking purposes only, with the right of unobstructed parking and ingress and egress over and across said Easterly portions of said lots that no buildings, fences or other structures shall be erected upon said Easterly portions of said lots and that said terrace and parking space shall at all times be kept in good order and repair, clean and serviceable and shall have adequate drainage facilities for surface waters, the cost and expense thereof to be borne and paid by the first and second parties hereto, their heirs and assigns, in the shares and proportions which the number of feet frontage of the respective properties of the parties hereto, their respective heirs and assigns abutting said terrace and parking space bears to the total number of feet of the Easterly frontage of said Lots 22 to 31 both inclusive, and in evidence of their intention to be bound by said covenant the grantees sign and seal this deed.

• • • • •

31

Filed Nov 30 1945

**Order for Summary Judgment in Favor of David Sackett
and Everett J. Rosenberg.**

This cause came on to be heard upon the motion of David Sackett and Everett J. Rosenberg, defendants and third-party defendants herein, for summary judgment against Kermit Steuer, plaintiff, and Columbia Construction Co., Inc., third-party plaintiff, and thereupon, upon consideration of said motion, the affidavit in support thereof and the pleadings on file, and after hearing in open court, and it appearing to the court that there is no genuine issue as to any material fact and that the moving parties are entitled to judgment as a matter of law, it is, this 30th day of November, 1945,

32 Ordered that said motion for summary judgment be and it is hereby granted; and it is

Further Ordered and Adjudged that the complaint of said Kermit Steuer, plaintiff, and the third-party complaint of said Columbia Construction Co., Inc., third-party plaintiff, be and they are hereby dismissed as to said David Sackett and Everett J. Rosenberg, defendants and third-party defendants, and that said defendants and third-party defendants have and recover from said plaintiff and third-party plaintiff their costs in this action and have execution therefor.

MARTIN McGUIRE

Justice

BRIEF FOR APPELLEES

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 9198

COLUMBIA CONSTRUCTION Co., Inc., a corporation, et al.,
Appellants,

v.

DAVID SACKETT AND EVERETT J. ROSENBERG, ETC.,
Appellees.

Appeal from the District Court of the United States for the
District of Columbia.

*United States Court of Appeals
for the District of Columbia*

FILED APR 10 1946

Joseph Whitcomb

LOUIS M. DENIT,
A. LECKIE COX,
Attorneys for Appellees,
719 15th Street, N.W.,
Washington 5, D. C.

BRANDENBURG & BRANDENBURG,
Of Counsel.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

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COLUMBIA CONSTRUCTION Co., Inc., a corporation, et al.,
Appellants,

v.

DAVID SACKETT AND EVERETT J. ROSENBERG, ETC.,
Appellees.

Appeal from the District Court of the United States for the
District of Columbia.

BRIEF FOR APPELLEES.

COUNTER-STATEMENT OF THE CASE.

Appellant, owner of the premises involved, was named defendant in a complaint filed by Kermit Steuer for damages for injuries claimed to have been sustained in a fall caused by an alleged defect in steps in front of No. 3730 Tenth Street, Northeast, in District of Columbia. (Appellant's App. 2)

Upon motion of appellant, appellees were brought in as third-party defendants, it being asserted that they were lessees of the premises under a written lease which provided, among other things, that the lessee would "keep said

leased premises, including the building, fixtures, plumbing and appurtenances thereof in substantial condition and in good repair . . .". (Joint App. 7) Steuer filed an amended complaint adding appellees as parties defendant. (Appellant's App. 10)

Thereafter, appellees filed a motion for summary judgment against both appellant and Steuer. (Appellant's App. 12) The facts set forth in the affidavit and exhibits in support of said motion (Appellant's App. 13-25) were uncontradicted. They constitute all the facts before the lower court when the motion was heard, and are as follows:

The premises, 3730 10th Street, N.E., are part of a development commonly known as a "park and shop" area, comprising Lots 22 to 31 in Square 3822 and the improvements thereon. The development consists of several buildings, used for stores and commercial purposes, built around a paved driveway available for parking. The entrances to the buildings open on a sidewalk or terrace which separates the buildings from and partially surrounds the parking area. The sidewalk is used by patrons and occupants in entering and leaving the various establishments. The accident complained of occurred at a place not ordinarily used by patrons of the premises occupied by appellees, and appellees never exercised or attempted to exercise any control over said sidewalk or over the steps leading from the parking area to it. Four photographs of the area were before the trial court. (Appellant's App. 21, 22, 23 and 24) The buildings included in the development were owned by appellant and others not parties to this action. The entire development is subject to a covenant (Appellant's App. 25) that the owners of said lots, their lessees and patrons of improvements thereon shall have the right of ingress and egress and unobstructed parking over all the unimproved easterly portions of said lots, and that the cost of keeping said easterly unimproved portions of said lots in good order and repair, clean and serviceable, shall be borne by the owners in the proportions which the frontage of their properties abutting the terrace and parking area

bears to the easterly frontage of said lots 22 to 31. The existence of this covenant was unknown to appellees when their lease was executed and was not considered by them in the negotiations for said lease. (Appellant's App. 15)

Since there were no facts in dispute, the trial court held that as a matter of law appellees were not liable, and entered judgment in appellees' favor against both Steuer and appellant. (Appellant's App. 26)

SUMMARY OF ARGUMENT.

Points I, II, III and IV.

The lease between the parties hereto did not and could not cover that portion of the walk and steps at which the injury is alleged to have occurred. The walk and steps were clearly designed to be used in common by the owners, lessees and patrons of the entire development, and this right of use in common was expressly reserved by the covenant against the property. Accordingly, it was the duty of appellant, as landlord, to maintain and repair said walk and steps.

Point V.

Appellant had ample opportunity to file counter-affidavits as to any fact alleged in appellees' affidavit. This was not done. Therefore, the facts must be accepted as true, as in fact they are.

ARGUMENT.

Points I, II, III and IV.

Appellant owned and controlled other buildings in the "park and shop" development in addition to that occupied by appellees. (Appellant's App. 14) The sidewalk and steps leading thereto were for the use in common of all occupants and patrons of the various buildings. (Appellant's App. 13) The photographs before the court (Appellant's App. 21, 22, 23 and 24) show that pedestrians desiring to patronize any of the establishments in the develop-

ment could gain access to the walk extending around the area only by the sidewalk leading directly to appellees' premises (Appellant's App. 22), or by a similar walk located at the other end of the development. Otherwise, approach would have to be over the area reserved for the movement and parking of vehicles. This use of the sidewalk was provided for and required by a covenant binding upon the entire development. (Appellant's App. 14, 25) Appellees were prohibited thereby and refrained from exercising control over the walk and steps where the accident occurred. (Appellant's App. 14) Although appellant now attempts to contradict the fact in its brief, (Page 12) the record plainly indicates "that the portion of the walk where the accident here complained of occurred would not ordinarily be used by a patron of the premises occupied by the defendants (appellees)." (Appellant's App. 14) The photograph "Exhibit 'C'" (Appellant's App. 22) shows the only entrance to the premises occupied by appellees. The place of the accident was some distance to the right of this entrance and is shown in "Exhibit 'B'" (Appellant's App. 21) at the extreme right end of the walk in front of the building bearing appellees' trade name, "All State Home Equipment Co.". The walk was only of incidental benefit to appellees, being primarily for the advantage and use of the occupants and patrons of the development as a whole.

It is well established that, in the absence of a specific agreement to the contrary, where a landlord retains possession and control of a portion of leased premises for the use in common of different tenants, the law imposes on him the duty to keep those portions in repair.

Security Savings & Commercial Bank v. Sullivan,
49 App. D. C. 119, 121; 261 Fed. 461.

Walker v. Dante, 61 App. D. C. 175, 177; 56 F. (2d)
1076.

Altemus v. Talmadge, 61 App. D. C. 148, 151; 58 F.
(2d) 874.

United Shoe Machinery Corp. v. Paine, 26 F. (2d) 594.

Readman v. Conway, 126 Mass. 374.

Ruane v. Doyle, 308 Mass. 418; 32 N. E. (2d) 244.

In *Readman v. Conway, supra*, the defendants were owners of a building consisting of three shops or tenements having a wooden platform running across the three shops and to the sidewalk. There were no fences or lines of any kind separating the parts of the platform in front of the several shops from each other, the platform being entirely open for persons to pass over it in any direction going to or from any of the shops. The shops were rented to three different tenants under oral leases. *The sole question involved was whether the landlord or tenant was liable for an injury occasioned by a defect in the platform.* In holding that the landlord was liable, the court said:

“If the lease to each tenant was of the shop occupied by him, and the landlords had constructed a platform for the common use and benefit of all the shops and of the public, there would be no presumption, in the absence of any agreement to that effect, that the tenants were to keep the platform in repair. Neither tenant acquired any exclusive right to use or control the part of the platform in front of his shop, and there was no such leasing of the platform as would exonerate the landlords from responsibility for defects in it.”

In *Altemus v. Talmadge, supra*, the injury complained of was occasioned by a hole or depression in the pavement in front of the leased premises. The premises were built to within eighteen inches of the lot line and the unimproved eighteen inch area was paved with cement blocks and joined to the sidewalk blocks placed by the District of Columbia so that it was impossible to ascertain visually what part was public sidewalk and what part was private. The largest part of the hole in question was on the private walk. The landlord sought to escape liability on the ground that the

tenant had entire possession and control of the premises. Answering that contention, the court said:

“In the case under consideration, the defect was in a part of the sidewalk which, though in front of the store leased to the tenant, was for use by the public and people having business in any of appellant’s properties. In such circumstances, the measure of responsibility of a tenant having exclusive possession and control does not attach. Here the property adjacent to the city sidewalk and not occupied by the building was by the act of the lot owner paved and connected up with the highway so that the line of separation between the two was destroyed, and this was the equivalent of an invitation to the public to use it all as a street. The fact that it was also essential in the practicable use of the leased premises did not of itself, and without something more, shift the responsibility of maintaining it in good order from the owner to the tenant, and this is true, if for no other reason, because the principle of implied responsibility on the part of the tenant grows out of exclusive possession, and, where that is lacking, the implication falls.”

See also *Morgan v. Kroger Grocery & Baking Co.*, 348 Mo. 542; 154 S. W. (2d) 44; 6 Neg. Cases 321.

The question, whether portions of leased premises were retained in the possession and control of the landlord, was considered in *Williamson v. Wellman*, 156 Va. 417; 158 S. E. 777. That case involved a suit for damages to a licensee occasioned by the falling of a platform attached to the second floor of defendant’s premises. The floor was divided into two flats, leased to different lessees, access to which was by an outside stairway at the top of which was the uncovered platform from which doors opened into each flat. In answer to the defendant’s contention, on appeal, that plaintiff had not proved that possession and control of the platform was in the landlord, the court said:

“The only approach to the second floor was the stairway and platform. It was thereby clearly designed to be used in common and was, in fact, so used by the

separate tenants. Neither of the tenants could have exclusive control or exclusive use and occupancy of these approaches. Therefore neither would have any responsibility for keeping them in repair or in proper condition for the use of the other. It follows that the possession and control of the stairway and platform remained in the landlord."

That portion of the walk and steps on which the accident occurred were within the possession and control of appellant. They were not only for the joint use of appellant and appellees, but also of other tenants of appellant and other owners and occupants of the development. There can be no question as to this in view of the covenant which specifically so provides. (Appellant's App. 25) Appellees could not control the use of said walk and steps any more than they could control the use of the public sidewalk. Without such possession and control there could be no relation of landlord and tenant respecting that area.

"A tenancy involves an interest in the land passed to the tenant and a possession exclusive even of the landlord except as the lease permits his entry. . . ." Tiffany, Real Property, 3d. Ed. Vol. 1, sec. 79.

"One who holds land as tenant of another has possession of the land, unless he has divested himself of the possession by creating a subtenancy. . . .

"Possession involves not only the exercise of acts of ownership over the land, but also the exclusion of the exercise of such acts by others. . . ." Tiffany, Real Property, 3d Ed. Vol. 1, sec. 94.

If the parties to the lease desired to contract with reference to said walk and its repair, a covenant to that effect should have been included in the lease. It cannot be implied.

"The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended." *Sheets v. Selden, et al*, 74 U. S. 416, 19 L. Ed. 166, 168.

The plain language of the lease (Appellant's App. 15) cannot be construed to include the walk and steps. The premises were leased by street number and such a lease includes only so much of the lot upon which the building is situated as is necessary to the complete enjoyment of the building for the purpose for which it was let, and nothing more. *Meredith v. McCormick*, 208 Mich. 563, 175 N. W. 280.

Appellant's contention that the entire sidewalk and steps are included within the terms "premises", "building", "fixtures", "plumbing" or "appurtenances" is unsound. It is not a part of the building, or a fixture, or a part of the plumbing. Neither can the term "appurtenances" be construed to include such walk:

"This term, both in common parlance and legal acceptance, is used to signify something appertaining to another thing as principal, and it passes as an incident to the principal thing. Lord Coke says (Coke Lit., 121,b) a thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. According to this rule, land cannot be appurtenant to land." *Harris et al. v. Elliott*, 10 Peters 25; 9 L.Ed. 330.

The lease is in the usual form, and the covenant as to repairs was intended to impose upon the appellees the duty to make repairs necessitated by their use of the building, and no other. It must be construed most strongly in favor of the lessee. *Theunissen et al. v. Huyer's Inc.*, 58 App. D. C. 106; 25 F. (2d) 530.

Point V.

Appellant cannot on this appeal contradict allegations not challenged below. Rule 56 of the Federal Rules of Civil Procedure specifically provides for the filing of opposing affidavits, but appellant did not see fit to take advantage thereof.

Appellees do not contend that the covenant constitutes a complete bar to an agreement to repair the walk or steps in question. They do contend, however, that such a covenant is conclusive of the fact that possession and control of the walk and steps were reserved by the landlord for the use of the several tenants and other occupants of the development. Under such circumstances it was the duty of appellant to repair and maintain the walk and steps. Also, because of the covenant, the landlord was prevented from giving appellees that exclusive possession and exclusive control of the walk which is necessary to constitute a tenancy.

CONCLUSION.

On the uncontradicted facts appellant retained possession and control of the walk and steps here involved. In such case the landlord is responsible for repairs to the area so retained, and this liability cannot be passed on to the tenant without an express covenant on his part.

It is respectfully submitted that the motion for summary judgment was properly granted, and that the judgment of the court below should be affirmed.

Respectfully submitted,

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REPLY BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9198

COLUMBIA CONSTRUCTION CO., a Corporation, et al.,
Appellants,

v.

DAVID SACKETT AND EVERETT J. ROSENBERG,
ETC., *Appellees.*

**Appeal from the District Court of the United States for the
District of Columbia.**

*United States Court of Appeals
for the District of Columbia*

FILED MAY 24 1946

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REPLY BRIEF FOR APPELLANT.

The cases cited by the Appellees on pages 4 and 5 of their brief are not relevant to the issue raised on this appeal. These cases establish the rule that where a landlord leases portions of property to different tenants and retains possession and control of a portion of the leased premises for the use in common of different tenants, *and there is no express*

agreement covering the duty to make repairs, the duty to make repairs in the commonly used portion of the premises is on the landlord. This is undoubtedly the law in the District of Columbia and apparently the law in all jurisdictions in which the question has arisen.

This rule, however, is not applicable to the case before the Court for in this case the lease contains an express agreement that the tenant shall make repairs to the "leased premises including the building, fixtures, plumbing and appurtenances thereof." Under these circumstances the rule established in the cases cited by the Appellees is superseded by the express agreement and ceases to be applicable.

The Appellees appear to be under the impression that because the steps on which the accident occurred could be used by "other tenants of the Appellant and other owners and occupants of the development," the covenant to repair did not apply to the steps (Appellees' Brief, page 7). There is nothing to prevent the tenant by covenant in his lease from obligating himself to repair portions of the premises which may be used in common by other tenants. In *Trego v. Rubovits*, (1913) 178 Ill. App. 127, Trego leased to Rubovits the first floor, basement and third floor of the building for a period of five years. The lease contained the following provisions:

"It being understood and agreed that the elevator, halls and stairways in said building shall be used jointly by all the tenants in said building."

* * * * *

"It is expressly understood that during said term said parties of the second part (the lessees) shall make all repairs needed in or about the premises and will also at their own expense keep the elevator in good condition and repair."

One McDonald was injured on the elevator because of bad repair and sued Trego, the owner of the building, and recovered damages. Trego settled the judgment and sued

Rubovits for breach of covenant. In deciding cross-appeals in favor of Trego, the Court said (page 133) :

“Appellee, as owner owed the legal duty to all other tenants and to all other parties rightfully using the elevator, except the lessees, to keep the same in a reasonably safe condition at his expense. This duty could not be, as to such tenants and parties, and was not, abrogated by the contract with said lessees. *B. Shoninger Co. v. Mann*, 219 Ill. 242. In all that class of cases where one party owes a legal duty to the public and to third persons to keep a place or an instrumentality reasonably safe, whenever another, by contract, agrees to perform that duty for him upon sufficient consideration, such contract by implication of law becomes one of indemnity and renders the party assuming such duty by contract liable for all damages that may legally be recovered by third persons against such party upon whom the law had in the first instance cast such duty, as a result of the failure to comply with such contract.”

In view of the fact that the steps on which the accident occurred were subject to the use of other tenants and other owners and occupants of the development, it may be that the Appellant, as owner of the property, would remain liable to any person other than its tenant if such person were injured through the negligent maintenance of the steps. In other words, the owner of the property cannot, by covenanting with its tenant to keep the steps in repair, avoid liability to the public; but if a member of the public is injured because of negligent maintenance of the steps and the owner of the property is required to pay damages to such member of the public, he may recover the amount of such damages from the tenant. Thus, in *Hanley et ux. v. Ryan et ux.*, (1925) 87 Pa. Superior Ct. 6, it was said (page 10) :

“While it is true that the covenant in the lease requiring the lessee to make repairs did not operate to relieve the lessor from a duty resting on him when the contract was executed nor discharge the lessor from his responsibility to the public or third persons, (*Folkman v. Lauer*, 244 Pa. 605; 607; *Kane v. Lauer*, 52 Pa.

Superior Ct. 467), nevertheless it established a relation between the parties to the lease which entitled the landlord to indemnity from the tenant in case the former was required to pay damages to a third person through the neglect of the tenant to keep the leased premises in repair as covenanted."

On the point of the duty of the tenant to indemnify the landlord if breach of covenant to repair results in damages to the landlord, there is an annotation in Volume 157 of the *American Law Reports*, at page 623. Closely related in principle is *Washington Gas Light Co. v. District of Columbia*, (1895) 161 U. S. 316.

The question of whether the covenant to repair contained in the lease applies to the steps is discussed in Appellant's original brief under Point I (page 8 et seq.). In view of the statement by the Appellees that "The plain language of the lease cannot be construed to include the walks and steps," (Appellees' Brief, page 8) it can be reiterated that the steps were either a part of the building, a part of the premises not the building, or an appurtenance of the leased premises. In any case the tenant expressly covenanted to keep them in repair.

The property covered by the lease is described in the lease in the following words (App. 15):

"* * * the following described premises situate, lying and being in the District of Columbia and known and designated as premises No. 3730 Tenth Street, Northeast, * * *"

It would be a strangely restricted construction of this clause in the lease to say that the leased premises stopped with the front wall of the building and did not contain the front part of the lot. Such a construction would exclude from the leased premises the steps which are necessary to an enjoyment of the building and the roof over the steps which is architecturally and functionally part of the building. But assuming, *arguendo*, that the leased premises do stop with the front wall of the building, the tenant must have access

to the building and such access can be had only over the steps and platform on which the injury occurred. The tenant has of necessity a right of way over the steps and platform. In these circumstances the steps and platform constitute an appurtenance of the premises. In *Humphreys v. McKissock*, (1890) 140 U. S. 304, it is said at page 313:

“A thing is appurtenant to something else only when it stands in the relation of an incident to a principal and is necessarily connected with the use and enjoyment of the latter.”

If the leased premises, therefore, do stop with the front wall of the building and the steps and platform are only an appurtenance thereto, the Appellees by the express words of their covenant obligated themselves to keep the steps and platform in repair.

The District Court, it is submitted, erred in granting a motion for summary judgment and should be reversed.

Respectfully submitted,

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